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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1167.

LION DRY GOODS, INC.,

Petitioner,

vs.

RETAIL STORE EMPLOYEES UNION, LOCAL 954, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NO. 128 and 633,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

I. Where an agreement between an employer and a labor organization provides that an employee may take his grievance to the chairman of a tribunal for adjudication, may the individual employee be represented by the contracting labor organization in processing the grievance?

II. Where the parties to an agreement authorize a majority of an arbitration panel to make final and binding decisions, may two members of the three member panel render a valid award?

III. Was the remedy provided by the District Court appropriate and within the power of the Court?

COUNTER-STATEMENT OF FACTS.

Although Petitioner has devoted a large part of its Petition to a statement of the case, it is necessary for Respondents to clarify some of the events as related by Petitioner.

The case now before this Court is another round in litigation that arose out of Statements of Understanding arrived at between Petitioner, a retail department store in Toledo, Ohio, and Respondent unions through the Toledo Labor-Management-Citizens Committee, a local mediation and arbitration body (hereinafter referred to as L-M-C) in 1958.

The earlier history of the litigation is set out in the opinions in *Retail Clerks International Association, etc. v. Lion Dry Goods, Inc.*, 341 F. 2d 715 (6th Cir. 1965) and *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U. S. 17 (1962).

The text of the Statement of Understanding here involved is set out at Appendix D, page 45 of the Petition.

After litigation in the original case had begun in April, 1959, the events which make up the instant appeal began to unfold. Additional grievances were filed with the Chairman of the Toledo L-M-C, Monsignor Michael J. Doyle, shortly after the original hearings which produced the awards involved in the first action. One of these grievances involved Ruth Morris, an employee of Petitioner, whose discharge was challenged as in violation of the 1958 Statement of Understanding.

After the action had been filed in the original case, the department stores sought to suspend hearings on further grievances. Nonetheless, an L-M-C Panel was convened to hear grievances on June 15, 1959, and was later adjourned until June 19, 1959, with further notice to de-

fendant. Awards were rendered thereafter, with Petitioner failing to appear.

At the trial, it was shown that Monsignor Doyle, after discussing the matter with Green on June 22, 1959, had several conversations concerning the matter of holding hearings during this period. Monsignor Doyle emphatically stated that he did not agree to suspend the hearings but only that he had agreed with Green that "not much hope could be held out to do any constructive work while this thing was in the courts." He said further that when he learned that others desired to continue the hearings his response was, "We must have the hearing." This was communicated to Green, and never denied in any manner by Mr. Green or any other representative of Petitioner at any time to the present. This strongly contradicts the assertion of Petitioner that it was not notified of the resumption of hearings until December, 1959 (Pet., p. 9). Green's own letter dated October 14, 1959, to Monsignor Doyle refers to a notice of October 2, 1959, concerning the resumption of hearings. In any event, these facts are irrelevant to the issues posed in the Petition, since Petitioner has not presented any question concerning them.

The Management member of the Panel, one Joseph Tillman, was apparently unable to appear on the date of decision, but a letter was sent to him by Monsignor Doyle relating what transpired. A Labor representative attended and participated in the proceedings along with Monsignor Doyle. No dissent from this procedure was ever made by Tillman or by Petitioner until the trial of this action.

The complaint in the action alleged:

> "An employee of defendant named Ruth Morris was wrongfully and improperly and without just cause discharged by the defendant on February 23, 1959. A grievance and complaint *on behalf of the afore-*

said Ruth Morris was thereafter filed by plaintiffs Locals 128 and 633 with the L-M-C for arbitration pursuant to the agreement of December 24, 1958." (Emphasis supplied.)

The answer never contested the fact that the unions were acting on behalf of Ruth Morris, but rather that they had no right to do so.

Judge Young on the hearing of the consolidated cases made the following findings of fact:

* * * * *

"Plaintiffs presented an individual grievance on behalf of one Ruth Morris, an employee of defendant, to the chairman of the Toledo Labor-Management-Citizens Committee, alleging that Ruth Morris had been improperly discharged by the defendant, and was entitled to restoration of her job under the Statements of Understanding.

* * * * *

Upon due notice to the defendant, Monsignor Michael J. Doyle, as the chairman of the L-M-C, convened a panel made up of a representative of labor and a representative of management as provided in the Statements of Understanding to hear the grievance of Ruth Morris, which was heard on or about July 16, 1959.

Defendant notified Monsignor Michael J. Doyle by letter of April 20, 1959, prior to such hearing, that it would not participate in any further hearings of the L-M-C pursuant to the Statements of Understanding until the litigation in Case No. 8199 brought by plaintiffs was finally decided and terminated.

In accordance with such prior notice, defendant did not appear and participate in the hearings on July 16, 1959 and was thereupon in default.

* * * * *

There was no accord between defendant and plaintiffs or any other party, that no further hearings of the L-M-C would be held until the litigation in Case No. 8199 was concluded."

The District Court held:

"Plaintiffs are labor organizations who represented employees of defendant for the purpose of presenting their grievances under the Statement of Understanding of the parties of December 24, 1958.

The grievance of employe Ruth Morris was an individual employee grievance under the Statement of Understanding which was properly presented to the Chairman of the Toledo-Labor-Management-Citizens Committee by her representative in accordance with such Statement of Understanding.

The L-M-C Panel which heard the grievance was at all times properly constituted and authorized by the parties to hear such grievance and was in no manner prohibited or prevented from hearing such grievance and making an award thereon.

The award of the L-M-C Panel directing the defendant Lion Dry Goods, Inc., to restore Ruth Morris to her job is a valid arbitration award enforceable under § 301 of the Act.

Plaintiffs are entitled to final judgment as prayed for in their complaint, and for their costs."

The Court of Appeals affirmed the holding October 17, 1967.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

Petitioner has asked that the Supreme Court entertain this case on the ground that the action of the lower courts is in conflict with decisions of other Courts of Appeals and of this Court.

To the contrary, the decision of the District Court affirmed by the Court of Appeals is completely in accord with settled law and no question is presented which warrants review by this Court.

I. Where an agreement between an employer and a labor organization provides that an employee may take his grievance to the Chairman of a tribunal for adjudication the individual may be represented by the contracting labor organization in processing the grievance.

Petitioner presents five questions in his application for a writ of certiorari. The first three are but differently phrased reiterations of one basic question directed to the validity of the above proposition which Respondents believe to be a correct statement of the law. This is the sole issue discussed by Petitioner and has been the basic point raised by Petitioner throughout the appeal of this case.

The issue arises out of the following provision of the Statement of Understanding entered into in 1958:

> "Any individual employee who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with the L-M-C and who has presented such grievance to his supervisor and the personnel department without reaching a satisfactory solution, may take his case to the chairman of the L-M-C who in turn shall refer the case to a panel of the L-M-C whose majority decision and order shall be final and binding * * *."

The facts are not in dispute. The union represented the employee Ruth Morris before the arbitration panel and in bringing the action. In so doing the union did not act in its own right but on behalf of the individual employee. This is clearly set forth in the pleadings. Paragraph 7 of the complaint alleges:

> "An employee of defendant named Ruth Morris was wrongfully and improperly and without just cause discharged by the defendant on February 23, 1959. A grievance and complaint on behalf of the aforesaid Ruth Morris was thereafter filed by plaintiffs Locals 128 and 633 with the LMC for arbitration pursuant to the agreement of December 24, 1958."

The answer never contested the fact that the unions were acting on behalf of Ruth Morris, but rather that they had no right to do so. Paragraph 5 of the answer asserts that "if a grievance and complaint was filed by Locals 128 and 633 on behalf of Ruth Morris as alleged in paragraph 7 of the complaint, the *receipt of such a grievance* and complaint and any action taken thereon by the L-M-C or any panel thereof *was without authority*." (Emphasis supplied.)

Petitioner argues (and has stated its questions presented so as to imply) that since the union is not the majority representative it cannot act in any way on behalf of an aggrieved employee. This is manifest in its statement on page 16 of its brief:

> "As a part and parcel of the Statement of Understanding, the parties deliberately and with clarity set forth that the Union did not represent and would not be recognized as the statutory agent of the employees until certified as a result of an election conducted by the National Labor Relations Board. Such an election has never been requested."

This argument was rejected by this Court the first time this controversy reached it, when the Court held that a labor organization need only "represent" employees to have standing under Section 301 to enforce a contract without any requirement of majority status. *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U. S. 17 (1962). This alone should be sufficient to deny the Petition.

Petitioner relies on the holdings of this Court in *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965) and *Vaca v. Sipes*, 386 U. S. 171 (1967), to support its position and to warrant the granting of certiorari. Neither case, however, is controlling or even of much relevance here.

In *Maddox*, the employee sued the employer for severance pay allegedly owed him under a collective bargaining agreement between the union and the employer. The Court held that the employee could not sidestep the grievance procedure set up in the agreement giving the union the right to assert such claim and go directly to law. The case is primarily concerned with exclusive and alternative remedies which are of no concern in this matter as it now reaches this Court.

Vaca v. Sipes was primarily concerned with jurisdictional issues raised when a discharged union member brought an action in the state court against officers and representatives of the union based on the claim that the union had arbitrarily refused to go to arbitration with the member's grievance. Petitioner relies on Section II (B) of the opinion in *Vaca* (at page 183) to support his position here. The language in the opinion states:

> "The rule is the same with regard to pre-emption where the bargaining agreement contains grievance and arbitration provisions which are intended to provide the exclusive remedy for breach of contract

claims. If an employee is discharged without cause in violation of such an agreement, that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compel arbitration of the employee's grievance, the adjudication of the claim by the arbitrator, or a suit to enforce the resulting arbitration award. See, e.g., *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403."

This language and the footnote reference to the first *Lion Dry Goods* case only concern the present case in re-stating that the contract in each instance established who shall have the right to invoke arbitration. The Court said in the footnote:

"Occasionally, the bargaining agreement will give the aggrieved employee, rather than his union, the right to invoke arbitration. See *Retail Clerks Intern. Ass'n., etc. v. Lion Dry Goods, Inc.*, 6 Cir., 341 F. 2d 715, cert. denied, 382 U. S. 839, 86 S. Ct. 87, 15 L. Ed. 2d 81."

That, however, is not the issue here. Respondents are in complete agreement with Petitioner that it is the individual employee in whom the Statement of Understanding vests the primary right to invoke arbitration.

The real issue is whether the individual who has that right can invoke the aid of the union in exercising it or must go it alone. It is a simple matter of agency as the District Court sought to make clear by use of the phrase, *"Qui facit per alium, facit per se."*

Judge Young said in his opinion (Pet. p. 19):

"The first matter to be disposed of is that these actions are prosecuted by the union, instead of the individual employees involved. This issue arises out of the language of the settlement agreements that 'Any individual employee who may have a grievance * * * may

> take his case to the chairman of the L-M-C * * *.' It is claimed by the defendants that this language must be taken literally. The Court prefers to rely on the ancient maxim, which is the basis of a large area of our common law jurisprudence, *'Qui facit per alium, facit per se.'* An individual employee is no less an individual because he seeks the active assistance of his union and its counsel to counterbalance the weight of his employer's forces of knowledgeable personnel and learned counsel. The complaints here involved are in fact those of individual employees, and the relief sought will inure to each employee * * *."

The District Court was unquestionably correct in holding that the union can aid and represent the individual member in such proceedings. First of all, it cannot be ignored that the unions are the contracting parties with the defendant stores. They were the signatories to the agreements, which gave certain benefits and protections to individual employees, including the right of each individual who considered himself aggrieved under the terms of the settlement agreement to take his case to the chairman of the L-M-C. The union had acted on behalf of employees, when it did not represent a majority, to cease the picketing and boycotting which was an essential element of the labor peace brought to Toledo by the December 24, 1958 settlement. Its stake in acting on behalf of the employees to assist them in processing their individual grievances is therefore unusually high under this agreement.

Petitioner is, in effect, arguing that an individual employee, no matter how helpless or ill equipped, must process a grievance and take it to arbitration alone, contending that the agreement between it and the labor organization involved calls for such restrictions. Would Petitioner's position prevent an individual employee from

hiring counsel to file the grievance on behalf of the employee and process it to arbitration? If legal counsel, or some person acting in a representative capacity, would not be prohibited, then why would an employee's labor union, which was a party to the basic contract itself, be denied the right to act as "counsel" or advocate for the individual?

Nor can the Petitioner take any lasting comfort in the language from the opinion in *Retail Clerks Internationl Association, etc. vs. Lion Dry Goods, Inc.*, 341 F. 2d 715 (6th Cir. 1965) cited at page 12 of its brief, for that Court clearly recognized that the union could stand in a representative status in processing grievances under the Statement of Understanding. At 341 F. 2d 715, 722 in discussing the case of the two sales ladies at LaSalle's, the Sixth Circuit said:

> "Although the union did not have the right to arbitrate this issue, and the amended complaint is very indefinite about whether the two employees or the union processed these grievances and presented them for arbitration, it does allege that the plaintiffs were representatives of the two employees in the proceeding, which allegation is accepted in the absence of a denial thereof."

The Court of Appeals made plain that if the union is a representative of the employees, it may act in their behalf to process an individual grievance going to the employees. This is exactly what happened here. The question of whether the union was authorized in the premises to represent the individual employee involved never arose: No denial or evidence disputing the fact of agency was ever presented by Petitioner. The Sixth Circuit's *per curiam* affirmance of the District Court's holding is strong indication that the Court of Appeals considered this question settled by its earlier treatment of it.

Moreover, this Court's holding in *United Automobile Workers v. Hoosier Cardinal Corporation,* 383 U. S. 696 (1966) is completely in point here in upholding a union's right to act on behalf of individual employees on individual claims. The Court said, at 383 U. S. 696:

> "We note at the outset that this action was properly brought by the union under Sec. 301. There is no merit to the contention that a union may not sue to recover wages or vacation pay claimed by its members pursuant to the terms of a collective bargaining contract. Such a suit is among those '[s]uits for violation of contracts between an employer and a labor organization' that Sec. 301 was designed to permit. This conclusion is unimpaired by the fact that each worker's claim may also depend upon the existence of his individual contract of employment. See *J. I. Case Co. vs. National Labor Relations Board,* 321 U. S. 332, 335-336. In *Smith vs. Evening News Assn.,* 371 U. S. 195, we rejected the view, once held for varying reasons by a majority of this Court, *Association of Westinghouse Salaried Employees vs. Westinghouse Corp.,* 348 U. S. 437, 'that Sec. 301 did not give the * * * courts jurisdiction over a suit brought by a union to enforce employee rights * * * characterized as * * * arising "from separate hiring contracts between the employer and each employee." ' 371 U. S., at 198. Although the Smith case was brought by an individual worker, there is every reason to recognize the union's standing to vindicate employee rights under a contract that union obtained. Such recognition is fully consistent with the language of Sec. 301 (b): 'Any * * * labor organization may sue * * * in behalf of the employees whom it represents in the courts of the United States.' 61 Stat. 156, 29 U. S. C. Sec. 185 (b). And indeed, the union's standing to vindicate employee rights under Sec. 301 implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract."

(The Court's reference here to "collective bargaining" was not limited to the majority situation, as Mr. Justice Stewart's opinion made clear in its footnote 1, where it was stated that the use of the term "collective bargaining contracts" was one of convenience only, citing the first *Lion Dry Goods* case, 369 U. S. 17.)

Thus, if the union has standing to vindicate individual employee rights in the courts under Sec. 301, it has no less a right to vindicate individual employee rights, when it represents an employee, in processing that individual's grievance to arbitration. As the Court also said, there is every reason to recognize the union's standing to vindicate employee rights under a contract the union obtained, which is the status of the Statement of Understanding in this case, since it was obtained by the union, as previously pointed out.

The case here is even stronger. Since it was the individual employee's grievance that was taken to the L-M-C, just as the agreement provided, it was the individual employee's right that was to be vindicated. The agent for the employee carrying the grievance to the chairman of the L-M-C, and speaking up as the advocate for the individual employee, was the union, acting at all times in behalf of the employee, which is language drawn from Sec. 301 itself.

Petitioner's argument that the union did not have a "right" to act in behalf of the individual employee should be summarily rejected.

II. Where the parties by agreement authorize a majority of an arbitration panel to make final and binding decisions, two members of three may render a valid award.

Petitioner has presented this issue as a question in his Petition for Certiorari but has not discussed it in its reasons. Respondents will not dwell on the issue at any length.

A three member panel was appointed. The Management member chose not to be present but was kept fully informed of the proceedings.

The District Court held that a majority of the panel could hear the grievance and render a valid and binding award. This is clearly in accord with the authorities as well as logic. Petitioner's failure to pursue it indicates a lack of belief in its merit.

III. The remedy provided by the District Court was appropriate and within the power of the court.

Like the issue stated in II, *supra,* Petitioner has raised an issue of the relief given by the lower court but has not addressed any part of its argument to the point so that Respondents again conclude that Petitioner does not feel the issue to be a sufficient basis for granting a writ of certiorari.

CONCLUSION.

Since the decisions of the Court of Appeals and of the District Court are clearly in accord with the decisions and settled principles of law of this Court, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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